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6 IN THE UNITED STATES DISTRICT COURT  
7 FOR THE DISTRICT OF ARIZONA  
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9 Leslie Hollingsworth, Jr., ) CIV 16-0080-PHX-JAT (MHB)  
10 Petitioner, ) **REPORT AND RECOMMENDATION**  
11 vs. )  
12 Charles L. Ryan, et al., )  
13 Respondents. )  
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15 TO THE HONORABLE JAMES A. TEILBORG, UNITED STATES DISTRICT COURT:

16 Petitioner Leslie Hollingsworth, Jr., who is confined in the Arizona State Prison  
17 Complex, filed a pro se Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254  
18 (Doc. 1). Respondents filed an Answer (Doc. 13), and Petitioner has filed multiple replies  
19 (Docs. 20, 21).

20 **BACKGROUND<sup>1</sup>**

21 Petitioner was indicted on one count each of possession of narcotic drugs for sale, sale  
22 or transportation of narcotic drugs, and possession of drug paraphernalia. (Exh. A.) On  
23 November 21, 2006, pursuant to a plea agreement, Petitioner pled guilty to one count of  
24 possession of narcotic drugs for sale. (Exhs. B, C.) On February 22, 2007, the trial court  
25 sentenced him to a term of imprisonment of 16 years. (Exh. D.)  
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28 <sup>1</sup> Unless otherwise noted, the following facts are derived from the exhibits submitted  
with Doc. 13 – Respondents’ Answer.

1 On March 20, 2007, Petitioner filed a notice of post-conviction relief. (Exh. E.) His  
2 appointed counsel filed a notice of completion of post-conviction review, stating that she was  
3 “unable to find any claims for relief to raise in post-conviction relief proceedings.” (Exh. F.)  
4 Petitioner filed a pro per petition for post-conviction relief, asserting that his counsel was  
5 ineffective for giving him erroneous advice about the sentence Petitioner would receive if  
6 he accepted the plea agreement. (Exh. G.) The State responded to the petition, and Petitioner  
7 filed a reply and supplement. (Exhs. H, I, J.) On January 16, 2008, the superior court  
8 dismissed the petition for post-conviction relief, concluding that Petitioner had not raised a  
9 colorable claim of ineffective assistance of counsel, and that the petition presents no material  
10 issue of fact or law which would entitle Petitioner to the relief sought in his petition. (Exh.  
11 K.)

12 On February 11, 2008, Petitioner filed a petition for review in the Arizona Court of  
13 Appeals. (Exh. L.) The State responded, and Petitioner replied. (Exhs. M, N.) The Arizona  
14 Court of Appeals denied review on November 14, 2008. (Exh. O.) On January 20, 2009,  
15 Petitioner filed a petition for review in the Arizona Supreme Court, which denied review on  
16 April 16, 2009. (Exhs. P, Q.)

17 On December 1, 2009, Petitioner filed a second notice of post-conviction relief. (Exh.  
18 R.) The superior court dismissed the petition on January 8, 2010, as precluded and untimely  
19 pursuant to Rules 32.2(a) and 32.4(a), Ariz. R. Crim. P. (Exh. S.) Petitioner filed a petition  
20 for review in the Arizona Court of Appeals on February 2, 2010. (Exh. T.) The State  
21 responded, and Petitioner replied. (Exhs. V, W.) On September 21, 2011, the Arizona Court  
22 of Appeals denied review. (Exh. X.) Petitioner did not file a petition for review with the  
23 Arizona Supreme Court.

24 Petitioner filed his third notice and petition for post-conviction relief, as well as a  
25 memorandum in support of his petition, on March 28, 2012. (Exhs. Y, Z, AA.) The superior  
26 court dismissed the petition on April 16, 2012. (Exh. BB.) Petitioner filed a petition for  
27 review in the Arizona Court of Appeals. (Exh. CC.) On August 13, 2013, the Arizona Court  
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1 of Appeals granted review but denied relief. (Exh. DD.) Petitioner did not file a petition for  
 2 review in the Arizona Supreme Court.

3 Petitioner filed his fourth petition for post-conviction relief on October 4, 2013. (Exh.  
 4 EE.) The superior court dismissed the petition on November 4, 2013. (Exh. FF.) Petitioner  
 5 filed a petition for review in the Arizona Court of Appeals. (Exh. GG.) The appellate court  
 6 granted review but denied relief on July 23, 2015. (Exh. HH.) Petitioner did not file a petition  
 7 for review in the Arizona Supreme Court.

8 Petitioner filed the instant habeas petition on January 6, 2016. (Doc. 1.) Petitioner  
 9 raises four grounds for relief. In Ground One, Petitioner alleges that the State violated the  
 10 terms of his plea agreement. In Ground Two, Petitioner asserts search and seizure violations.  
 11 In Ground Three, Petitioner alleges that he received ineffective assistance of counsel. In  
 12 Ground Four, Petitioner alleges the trial court violated unspecified constitutional rights.

### 13 **DISCUSSION**

14 In their Answer, Respondents contend that Petitioner's habeas petition is untimely  
 15 and, as such, must be denied and dismissed.

16 The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") imposes a  
 17 statute of limitations on federal petitions for writ of habeas corpus filed by state prisoners.  
 18 See 28 U.S.C. § 2244(d)(1). The statute provides:

19 A 1-year period of limitation shall apply to an application for a writ of habeas  
 20 corpus by a person in custody pursuant to the judgment of a State court. The  
 limitation period shall run from the latest of –

21 (A) the date on which the judgment became final by the conclusion of direct  
 22 review or the expiration of the time for seeking such review;

23 (B) the date on which the impediment to filing an application created by State  
 24 action in violation of the Constitution or laws of the United States is removed,  
 if the applicant was prevented from filing by such State action;

25 (C) the date on which the constitutional right asserted was initially recognized  
 26 by the Supreme Court, if the right has been newly recognized by the Supreme  
 Court and made retroactively applicable to cases on collateral review; or

27 (D) the date on which the factual predicate of the claim or claims presented  
 28 could have been discovered through the exercise of due diligence.

1 An “of-right” petition for post-conviction review under Arizona Rule of Criminal  
2 Procedure 32, which is available to criminal defendants who plead guilty, is a form of “direct  
3 review” within the meaning of 28 U.S.C. § 2244(d)(1)(A). See Summers v. Schriro, 481 F.3d  
4 710, 711 (9<sup>th</sup> Cir. 2007). Therefore, the judgment of conviction becomes final upon the  
5 conclusion of the Rule 32 of-right proceeding, or upon the expiration of the time for seeking  
6 such review. See id.

7 Additionally, “[t]he time during which a properly filed application for State post-  
8 conviction or other collateral review with respect to the pertinent judgment or claim is  
9 pending shall not be counted toward” the limitations period. 28 U.S.C. § 2244(d)(2); see Lott  
10 v. Mueller, 304 F.3d 918, 921 (9<sup>th</sup> Cir. 2002). A post-conviction petition is “clearly pending  
11 after it is filed with a state court, but before that court grants or denies the petition.” Chavis  
12 v. Lemarque, 382 F.3d 921, 925 (9<sup>th</sup> Cir. 2004). A state petition that is not filed, however,  
13 within the state’s required time limit is not “properly filed” and, therefore, the petitioner is  
14 not entitled to statutory tolling. See Pace v. DiGuglielmo, 544 U.S. 408, 413 (2005). “When  
15 a postconviction petition is untimely under state law, ‘that [is] the end of the matter’ for  
16 purposes of § 2244(d)(2).” Id. at 414.

17 In Arizona, post-conviction review is pending once a notice of post-conviction relief  
18 is filed even though the petition is not filed until later. See Isley v. Arizona Department of  
19 Corrections, 383 F.3d 1054, 1056 (9<sup>th</sup> Cir. 2004). An application for post-conviction relief  
20 is also pending during the intervals between a lower court decision and a review by a higher  
21 court. See Biggs v. Duncan, 339 F.3d 1045, 1048 (9<sup>th</sup> Cir. 2003) (citing Carey v. Saffold, 536  
22 U.S. 214, 223 (2002)). However, the time between a first and second application for post-  
23 conviction relief is not tolled because no application is “pending” during that period. See id.  
24 Moreover, filing a new petition for post-conviction relief does not reinitiate a limitations  
25 period that ended before the new petition was filed. See Ferguson v. Palmateer, 321 F.3d  
26 820, 823 (9<sup>th</sup> Cir. 2003).

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1 The statute of limitations under the AEDPA is subject to equitable tolling in  
2 appropriate cases. See Holland v. Florida, 560 U.S. 631, 645-46 (2010). However, for  
3 equitable tolling to apply, a petitioner must show ““(1) that he has been pursuing his rights  
4 diligently and (2) that some extraordinary circumstances stood in his way”” and prevented  
5 him from filing a timely petition. Id. at 2562 (quoting Pace, 544 U.S. at 418).

6 The Court finds that Petitioner’s Petition for Writ of Habeas Corpus is untimely. On  
7 February 22, 2007, the trial court sentenced Petitioner pursuant to the terms set forth in the  
8 plea agreement. By pleading guilty, Petitioner waived his right to a direct appeal, and had 90  
9 days to file an “of-right” petition for post-conviction relief under Rule 32 of the Arizona  
10 Rules of Criminal Procedure. Petitioner filed his timely PCR notice on March 20, 2007. On  
11 January 16, 2008, the superior court dismissed the petition for post-conviction relief. The  
12 Arizona Court of Appeals denied Petitioner’s petition for review on November 14, 2008, and  
13 the Arizona Supreme Court denied review on April 16, 2009. Thereafter, Petitioner had 90  
14 days to file a petition for writ of certiorari in the United States Supreme Court, which he  
15 failed to do. See Bowen v. Roe, 188 F.3d 1157, 1158-59 (9<sup>th</sup> Cir. 1999) (“[T]he period of  
16 ‘direct review’ in 28 U.S.C. § 2244(d)(1)(A) includes the period within which a petitioner  
17 can file a petition for a writ of certiorari from the United States Supreme Court, whether or  
18 not the petitioner actually files such a petition.”).

19 Thus, Petitioner’s case became final and the statute of limitations began running on  
20 July 15, 2009. Petitioner was required to file the instant habeas petition on or before July 15,  
21 2010. Petitioner did not initiate his habeas proceedings until January 6, 2016. Accordingly,  
22 absent any tolling, his habeas petition is over five years too late.

23 Petitioner is not entitled to statutory tolling. Petitioner’s commencement of three  
24 subsequent PCR proceedings in December 2009, March 2012, and October 2013, did not toll  
25 the limitations period. The state court dismissed these proceedings pursuant to Rules 32.2(a)  
26 and 32.4(a), Ariz. R. Crim. P, for failing to timely file a PCR petition or failing to state a  
27 claim for which relief could be granted in an untimely or successive Rule 32 proceeding.  
28 Thus, the PCR proceedings were not “properly filed” under 28 U.S.C. § 2244(d)(2). See, e.g.,

1 Pace, 544 U.S. at 414-17; Bonner v. Carey, 425 F.3d 1145, 1148-49 (9<sup>th</sup> Cir. 2005)  
 2 (recognizing and applying Pace). Furthermore, the March 2012 and October 2013  
 3 proceedings were filed after the limitations period had expired, and, thus, did not toll the  
 4 limitations period. See Ferguson, 321 F.3d at 823 (“[S]ection 2244(d) does not permit the  
 5 re-initiation of the [federal 1-year] limitations period that has ended before the state petition  
 6 was filed.”).

7 The Ninth Circuit recognizes that the AEDPA’s limitations period may be equitably  
 8 tolled because it is a statute of limitations, not a jurisdictional bar. See Calderon v. United  
 9 States Dist. Ct. (Beeler), 128 F.3d 1283, 1288 (9<sup>th</sup> Cir. 1997), overruled in part on other  
 10 grounds by Calderon v. United States Dist. Ct. (Kelly), 163 F.3d 530, 540 (9<sup>th</sup> Cir. 1998).  
 11 Tolling is appropriate when “‘extraordinary circumstances’ beyond a [petitioner’s] control  
 12 make it impossible to file a petition on time.” Id.; see Miranda v. Castro, 292 F.3d 1063,  
 13 1066 (9<sup>th</sup> Cir. 2002) (stating that “the threshold necessary to trigger equitable tolling [under  
 14 AEDPA] is very high, lest the exceptions swallow the rule”) (citations omitted). “When  
 15 external forces, rather than a petitioner’s lack of diligence, account for the failure to file a  
 16 timely claim, equitable tolling of the statute of limitations may be appropriate.” Miles v.  
 17 Prunty, 187 F.3d 1104, 1107 (9<sup>th</sup> Cir. 1999). A petitioner seeking equitable tolling must  
 18 establish two elements: “(1) that he has been pursuing his rights diligently, and (2) that some  
 19 extraordinary circumstance stood in his way.” Pace, 544 U.S. at 418. Petitioner must also  
 20 establish a “causal connection” between the extraordinary circumstance and his failure to file  
 21 a timely petition. See Bryant v. Arizona Attorney General, 499 F.3d 1056, 1060 (9<sup>th</sup> Cir.  
 22 2007).

23 Petitioner asserts no reason for the untimeliness of his habeas petition, and therefore  
 24 demonstrates no entitlement to equitable tolling. There is nothing in the record that suggests  
 25 an external force prevented Petitioner from timely filing the Petition. And, Petitioner’s *pro*  
 26 *se* status, indigence, limited legal resources, ignorance of the law, or lack of representation  
 27 during the applicable filing period do not constitute extraordinary circumstances justifying  
 28 equitable tolling. See, e.g., Rasberry v. Garcia, 448 F.3d 1150, 1154 (9<sup>th</sup> Cir. 2006) (“[A] *pro*

se petitioner's lack of legal sophistication is not, by itself, an extraordinary circumstance warranting equitable tolling.").

Accordingly, Petitioner is not entitled to any tolling and his habeas petition is untimely.

### CONCLUSION

Having determined that Petitioner's habeas petition is untimely, the Court will recommend that Petitioner's Petition for Writ of Habeas Corpus be denied and dismissed with prejudice.

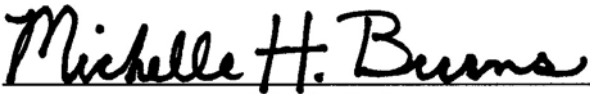
**IT IS THEREFORE RECOMMENDED** that Petitioner's Petition for Writ of Habeas Corpus (Doc. 1) **DENIED** and **DISMISSED WITH PREJUDICE**;

**IT IS FURTHER RECOMMENDED** that a Certificate of Appealability and leave to proceed *in forma pauperis* on appeal be **DENIED** because the dismissal of the Petition is justified by a plain procedural bar and jurists of reason would not find the procedural ruling debatable.

This recommendation is not an order that is immediately appealable to the Ninth Circuit Court of Appeals. Any notice of appeal pursuant to Rule 4(a)(1), Federal Rules of Appellate Procedure, should not be filed until entry of the district court's judgment. The parties shall have fourteen days from the date of service of a copy of this recommendation within which to file specific written objections with the Court. See 28 U.S.C. § 636(b)(1); Rules 72, 6(a), 6(b), Federal Rules of Civil Procedure. Thereafter, the parties have fourteen days within which to file a response to the objections. Pursuant to Rule 7.2, Local Rules of Civil Procedure for the United States District Court for the District of Arizona, objections to the Report and Recommendation may not exceed seventeen (17) pages in length. Failure timely to file objections to the Magistrate Judge's Report and Recommendation may result in the acceptance of the Report and Recommendation by the district court without further review. See United States v. Reyna-Tapia, 328 F.3d 1114, 1121 (9<sup>th</sup> Cir. 2003). Failure timely to file objections to any factual determinations of the Magistrate Judge will be considered a waiver of a party's right to appellate review of the findings of fact in an order

1 or judgment entered pursuant to the Magistrate Judge's recommendation. See Rule 72,  
2 Federal Rules of Civil Procedure.

3 DATED this 25th day of October, 2016.

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6 Michelle H. Burns  
7 United States Magistrate Judge  
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